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Classified By: Economic Counselor Edgard Kagan, Qasons 1.4(b)(d)

11. (C/NF) Summary: Australian Whaling Envoy Sandy Hollway is returning to Japan NLT October 30, despite Japanese signals that no deal is possible this year. Hollway hopes to secure some agreement from Japan to reduce the number of whales taken in the upcoming Japanese scientific whaling season. In anticipation of failure, however, the GOA continues to hone their international legal case, even though they understand the problems inherent in launching such an effort. PM Rudd may view international legal action as the least damaging politically of his limited choices in dealing with public anger over whaling. End Summary.

LEGAL CASE CLOSE TO FINALIZED?

12. (C/NF) Australia is very close to moving forward with international legal action against Japan. Department of Foreign Affairs and Trade director for Environment Strategies David Dutton (protect) told Econ Counselor and Econ Officer in separate discussions October 23 and 26 that DFAT and the Attorney General's Department (AGD) had long shared the view that international legal action against Japan's whaling program has a limited chance of success. Dutton said AGD has recently done an about face to argue that the prospects for success at the International Court of Justice are high enough to justify taking action. Dutton said his analysis is that the only effective basis for action is that Japan's whaling hunt in the Southern Ocean violates Article VIII of the International Whaling Convention because it does not accomplish substantive scientific outcomes. DFAT continues to believe that such a challenge will either fail completely or, at best, set up the Japanese to simply make changes to their program to improve the science. Either option would legitimize Japanese claims while destroying any chance of progress in the International Whaling Commission small working group format.

13. (C/NF) The AGD executive responsible for formulating the case, Bill Campbell, told econoff on October 27 that he was unwilling to discuss any possibility of legal action or the basis for their case. In the event that a decision to take legal action became clearer, Campbell said, then he might be able to discuss their thinking, but not until then.

HOLLWAY BACK TO JAPAN THIS WEEK

¶4. (C/NF) Hollway is preparing to follow up his October 22 letter to Deputy Foreign Minister Kohno with a second visit to Tokyo this week, accompanied by DFAT Assistant Secretary for Environment Greg French. Dutton told econoff that the Japanese Foreign Ministry had indicated privately to DFAT that they were willing to receive and listen to Hollway, but were "confused" over what Australia hopes to accomplish, as Japan had already made clear during his first visit that there were no plans to reduce or roll back plans for this whaling season. Dutton said that when Hollway returns, the GOA will be considering future action on November 5. Dutton said that Hollway has personally briefed Rudd twice on his efforts since being publicly rolled out in mid September, and Dutton believes that if Hollway took a position against legal action in front of the PM, it might have some affect on the final process. Dutton said that both FM Smith and Trade Minister Crean had made clear their opposition to an international legal challenge, but opined that, in his opinion, DFAT and by extension FM Smith had ceased to have much relevance in influencing the PM's office on this issue.

¶5. (C/NF) Comment: The brush off we received from AGD's raises our suspicions that the GOA is close to presenting a final case against Japan to Rudd. Given the likelihood that Hollway and DFAT will end up empty-handed, Rudd is increasingly worried that the Japanese will forge ahead despite Australian concerns. In the face of a divided cabinet, the final call will be made by Rudd, with a clear view to responding to an electorate which views the Labor government as slipping on environment and conservation issues. While Rudd may recognize the risk of legal action, aggressive posturing last year (air and sea monitoring of whale kills for "evidence") may have pushed him into a corner from which such a course seems the only reasonable response absent movement by Japan. End Comment.

MCCALLUM